RP (4)

No. 08-871

IN THE
Supreme Court of the United States

CANADIAN PACIFIC RAILWAY COMPANY *et al.*,
Petitioners,

v.

TOM LUNDEEN *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

This petition presents two important issues arising from Congress's effort to "correct" the federal courts' application of the Federal Railroad Safety Act in specific litigation. The Eighth Circuit (and this Court by denying certiorari) finally resolved one of respondents' substantive claims—for negligent track inspection—before Congress purported to "clarif[y]" the statute. The Eighth Circuit's later reliance upon the "clarification" to revisit and reverse the resolution of that claim contravenes *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and conflicts with other circuits' interpretations of *Plaut*'s "final decision" requirement. The Eighth Circuit also applied the "clarification" to reverse the initial resolution of *other* claims then on appeal even though Congress did not change the underlying law, thereby directly implicating the continued vitality of *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871).

Respondents sidestep these issues by assuming the answers to the questions presented. In their view, a claim resolved by a court of appeals, even after this Court's denial of certiorari, is never final under *Plaut* if courts continue to address other claims in the case. To avoid *Klein*, respondents attribute a meaning to Congress's "clarification" that the statute cannot bear and candidly assert that *Klein* has effectively become a nullity. By assuming away the questions presented, respondents do not meaningfully address the conflicts among the courts of appeals that justify review.

ARGUMENT

A. The Decision Below Contravenes *Plaut* And Conflicts With Decisions Of Other Circuits.

1. Respondents recognize that *Plaut* would bar the Eighth Circuit's decision below, and a circuit conflict would arise, if the court of appeals' earlier decision in *Lundeen I* were "final." To avoid this result, they rely on the false premise that *Lundeen I* was "interlocutory" and the issues it addressed were still "pending on appeal" when Congress clarified FRSA § 20106. See Resp. Br. 14, 18-21; U.S. Br. 7-10. To the contrary, the particular claim addressed in *Lundeen I* had been finally decided and was no longer pending when Congress acted.

Respondents' complaint included four distinct state-law claims. *Lundeen I* considered one of those claims—negligent track inspection—and held that federal law completely preempted that cause of action. Pet. App. 76a-78a. In so holding, the court necessarily concluded that "there is, in short, no such thing as a state-law claim" for negligent inspection, federal law "wholly displaces the state-law cause of action," and thus "the exclusive cause of action for the claim asserted" must be found in federal law, if at all. *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 8, 11 (2003); Pet. App. 75a-78a.

As respondents have previously recognized, *Lundeen I* finally resolved their negligent track inspection claim. In seeking this Court's review, respondents admitted that the Eighth Circuit's decision, unless reversed, would be the judiciary's final word on that claim: they conceded that FRSA provided no cause of action for negligent inspection and no state-law cause of action remained after

Lundeen I, and thus they would "have no remedy at all" for negligent inspection unless this Court granted review and reversed. Petition for Writ of Certiorari at 2, *Lundeen* v. *Canadian Pac. Ry. Co.*, No. 06-528 (filed Oct. 16, 2006). Certiorari was denied, Pet. App. 80a, and the case was remanded for consideration of respondents' remaining claims.

On remand, the district court confirmed that *Lundeen I* had finally resolved the negligent inspection claim. Respondents tried to avoid that outcome by asserting that the Eighth Circuit was "confused" and did not intend this result. Pet. App. 92a. The district court "decline[d] the invitation to sit in review of the Court of Appeals," and recognized that *Lundeen I*'s complete preemption determination "conclude[d] the inquiry" concerning negligent inspection (respondents having already conceded that they had no such claim under federal law). *Id.* at 91a-92a. In contrast, the district court separately addressed respondents' *other* claims and found them to be preempted. *Id.* at 94a-96a. The district court's ruling on these other issues was the only matter pending on appeal when Congress "clarifi[ed]" the FRSA.

As Judge Beam correctly observed, *Lundeen I*'s complete preemption holding foreclosed respondents' state-law negligent inspection claim in "a final judgment that cannot constitutionally be reopened or reversed by Congress or this court," and it was therefore not "'still on appeal' in any sense contemplated by *Plaut*." Pet. App. 37a-39a.

Respondents mistakenly rely on cases holding that this Court may "'reach back and correct errors in the interlocutory proceedings below'" upon review of a final judgment. See Resp. Br. 19-20; U.S. Br. 8. But those cases addressed clearly interim decisions like

an interlocutory order remanded for entry of a final trademark infringement decree (*Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916)); an order remanding a case for a new trial on evidentiary grounds (*Mercer* v. *Theriot*, 377 U.S. 152 (1964)); an order remanding a discrimination case for determination of remedial measures (*United States* v. *Virginia*, 518 U.S. 515 (1996)); and an interlocutory appeal of a trial verdict before consideration of damages (*Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481 (1968)). Those cases have no application when, as here, a court finally determines that a cause of action does not exist and all appeals are exhausted. See *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418 (1923) (when a *final* judgment is denied review on certiorari, this Court is "expressly denied power to review" that earlier judgment if another aspect of the case later comes before the Court).[1]

2. The finality of *Lundeen I*'s disposition of the negligent inspection claim is fatal to respondents'

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[1] For this reason, there is also no merit to the Government's suggestion that this case presents an issue related to *Carnegie-Mellon University* v. *Cohill*, 484 U.S. 343 (1988), that will likely be addressed in *Carlsbad Tech., Inc.* v. *HIF Bio, Inc.*, No. 07-1437 (argued Feb. 24, 2009). Jurisdiction to render the final decision in *Lundeen I* is simply not at issue in this petition seeking review of *Lundeen II*. *See Plaut*, 514 U.S. at 229 ("The issue here is not the validity or even the source of the legal rule that produced the Article III judgments, but rather the immunity from legislative abrogation of those judgments themselves."). The Government's argument is also substantively incorrect: the district court in *Lundeen I* remanded based on *Cohill and* under 28 U.S.C. § 1367(c), Resp. App. 7 & n.4, the latter of which is not at issue in *Carlsbad*. In any event, the pendency of *Carlsbad* would be at most a reason to hold the petition in this case, not to deny it.

opposition to certiorari on the first question presented. They concede that a judgment is "final" under *Plaut* when appeals run out and the decision "'becomes the last word of the judicial department with regard to a particular case or controversy;'" Congress cannot revise a judicial determination unless it is "*pending* before the [court of appeals] on a *direct appeal*." Resp. Br. 17-18 (quoting *Plaut*, 514 U.S. at 227).[2] Respondents unsuccessfully appealed *Lundeen I*'s disposition of the negligent inspection claim directly to this Court. That claim most certainly was not pending on appeal in *Lundeen II*.

The Government, for its part, simply endorses the Eighth Circuit's reasoning and denies that a cause of action can ever become "final" for purposes of *Plaut* when the claim was part of a case that remains before the courts. U.S. Br. 8-9. This presumes an answer to the first question presented, and as such is not a reason to deny the petition. See Robert L. Stern et al., *Supreme Court Practice* 255 (8th ed. 2002). Moreover, other courts have rejected the view of the Eighth Circuit and the Government. See Pet. 13-15. The Government's advocacy for one side of that dispute simply underscores the need for this Court's review.

In any event, the Government's interpretation of *Plaut* is wrong. The Government selectively quotes snippets from *Plaut* that refer to "cases" or "suits," but *Plaut* never endorsed the notion that Congress can reverse final judicial decisions merely because

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[2] Respondents insinuate that the petition misrepresents *Plaut* by "omi[tting] ... critical language," but all the language respondents quote merely reinforces *Plaut*'s holding, made clear in the petition, that a judgment becomes final once the time to appeal has expired. *Compare* Resp. Br. 16-18, *with* Pet. 10-12.

the judiciary is still considering other issues in a case. Instead, *Plaut* shields from legislative revision those judgments that resolve "a particular case *or controversy*," and the "distinction between judgments from which all appeals have been foregone or completed and judgments that remain on appeal" is critical to *Plaut*'s constitutional analysis. 514 U.S. at 227 (emphasis added).[3]

Nor is it an answer to maintain that a federal court must continually reassess jurisdiction over ongoing litigation. See Resp. Br. 18-19; U.S. Br. 8-9. Such jurisdictional determinations are necessary for claims on direct appeal, such as the causes of action at issue in *Lundeen II*. But as respondents admit, upon entry of a final judgment on a specific claim (as with their negligent inspection claim), jurisdiction is "considered forever settled as between the parties" and cannot be reopened on collateral attack. *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 524-25 (1931); Resp. Br. 21. Moreover, no occasion could arise to revisit that prior determination here because jurisdiction clearly existed for *Lundeen II* by virtue of the *other* state law claims the district court deemed preempted.[4]

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[3] Congress sought to overturn pre-existing law in this case only with respect to individual "pending State law causes of action," 49 U.S.C. § 20106(b)(2), not entire lawsuits.

[4] The Government similarly contends that review is unwarranted because a state court can "adjudicate petitioners' preemption defense under the FRSA." U.S. Br. 17. This is wholly beside the point: petitioners contest the Eighth Circuit's application of Congress's "clarification," an issue independent of preemption that presents *Plaut* and *Klein* issues not before the state courts. Petitioners do not seek review on the merits of any preemption defenses.

3. Having assumed that the Eighth Circuit's disposal of the negligent inspection claim in *Lundeen I* was not final, respondents have no answer to the circuit split created by *Lundeen II*. Respondents acknowledge that, but for their assertion that "the present appeals ... are a *continuation* of the primary litigation that was previously the subject of an interlocutory appeal in *Lundeen I*," *Lundeen II* would conflict with the Fourth, Fifth, and Tenth Circuit decisions cited in the petition (at 13-15). U.S. Br. 10; Resp. Br. 25-26. Respondents' attempts to distinguish *United States* v. *Vazquez-Rivera*, 135 F.3d 172 (1st Cir. 1998), are particularly unpersuasive. The First Circuit held that when a court renders a final decision on the meaning of a federal statute (as in *Lundeen I*), a later attempt by Congress to "clarif[y]" that meaning is "legally irrelevant" under *Plaut*, even if other aspects of the case remain before the courts. *Id.* at 177. Respondents note that *Vazquez-Rivera* arose in the context of an Ex Post Facto clause challenge, Resp. Br. 24-25; U.S. Br. 9, but the First Circuit nonetheless explicitly interpreted *Plaut* to mean that "post hoc statements regarding the original legislative intent do not affect this court's previous, and final, finding as to what that intent was." *Vazquez-Rivera*, 135 F.3d at 177. This holding squarely conflicts with *Lundeen II*.

B. The Decision Below Is Inconsistent With *Klein* And Deepens Longstanding Conflicts Among The Courts Of Appeals.

1. Under *Klein*, Congress can only "compel[] changes in law" by substantive amendment; it may not dictate "findings or results under old law." *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 438, 441 (1992). Respondents contend that Congress's "clarification" of § 20106 satisfies *Klein*

because it "added two entirely new subsections of text" to the FRSA and "alters the FRSA in a manner that sets out substantive standards." U.S. Br. 12, 14 n.7; Resp. Br. 29. This argument ignores Congress's reenactment of identical substantive statutory language, and its explanation that the additional "interpretive" language was designed specifically to target this litigation and to "rectify the Federal court decisions related to the Minot, North Dakota accident" by "clarify[ing] the intent and interpretations of the existing preemption statute" *without* making "any substantive change in the meaning of the provision." H.R. Conf. Rep. No. 110-259, at 351 (2007), *reprinted in* 2007 U.S.C.C.A.N. 119, 183 ("Conf. Report"); see Pet. 5-6, 18-19. "Clarify[ing]" a statute without "substantive[ly] chang[ing] the meaning of the provision" in order to overturn a particular judicial decision contravenes *Klein*.[5]

In *Robertson*, this Court noted that the constitutionality of statutes purporting to direct the outcome of a particular case without substantively changing the law's meaning is an unsettled question that it expressly left unresolved. 503 U.S. at 441. The circuits are deeply split on this point and have repeatedly asked for this Court's guidance. See Pet. 19-21, 23-25. That the courts of appeals have ultimately concluded in these cases that *Klein* is not

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[5] The Government implausibly suggests that Congress "likely" used the word "clarification" to mean a substantive amendment designed to resolve a split among the circuits, *see* U.S. Br. 13, and thus resorts to arguing that "clarification" means something different from its plain meaning and inconsistent with the statute's terms targeting this litigation. The Government also has no answer to the Conference Report and floor statements to the contrary.

violated, see U.S. Br. 14-15; Resp. Br. 32, or that these cases interpret statutes other than FRSA § 20106, see Resp. Br. 35-36, is beside the point. The relevant consideration is that the courts of appeals have articulated starkly different interpretations of *Klein*, creating a circuit split deepened by the Eighth Circuit in this case.

Contrary to respondents' assertion, the Fourth and Seventh Circuits do not "use the same reasoning" as other circuits in applying *Klein*. *Id.* at 31. The Fourth and Seventh Circuits regard *Klein* as focused not on whether Congress has legislated a new "standard," but on whether Congress has (as in this case) encroached upon "'the interpretive power of the courts'" by "dictat[ing] the judiciary's interpretation of governing law" without actually changing that law, thereby "mandat[ing] a particular result in any pending case." *Green* v. *French*, 143 F.3d 865, 874-75 (4th Cir. 1998), *abrogated in part on other grounds*, *Williams* v. *Taylor*, 529 U.S. 362 (2000); *Lindh* v. *Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997).[6]

Other circuits have adopted a far narrower view of *Klein* and accept any "new standard" enacted "through the legislative process." Pet. App. 12a; Pet. 19-20 (citing cases from the Second, Ninth, Tenth, and D.C. Circuits). The Eighth Circuit adopted this

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[6] Respondents err in contending that other cases in the Fourth and Seventh Circuits apply a more relaxed standard. Resp. Br. 32 (citing *City of Chicago* v. *U.S. Dep't of Treas.*, 423 F.3d 777 (7th Cir. 2005), and *Plyler* v. *Moore*, 100 F.3d 365 (4th Cir. 1996)). Those cases concluded that Congress enacted substantive amendments to the law and did not seek merely to change the outcome of a case by directing how the law must be interpreted. *See City of Chicago*, 423 F.3d at 783; *Plyler*, 100 F.3d at 372.

view in holding that *Klein* permits Congress to "clarify" § 20106, without purporting to change the statute's meaning, in order to change the outcome of this case. The Fourth and Seventh Circuits would reach a different conclusion.

2. Respondents also cannot avoid the conflict between the Eighth Circuit and other courts of appeals concerning the effect of "clarification" amendments. As explained in the petition, the Eighth Circuit treated Congress's "clarification" of § 20106 as a binding change in law, while other courts have regarded such amendments as merely advisory views of a subsequent Congress. See Pet. 21-23. In particular, the Seventh Circuit has warned that Congress's use of clarifying amendments raises serious separation of powers questions under *Klein* that call for "clarification from the Supreme Court." *Paramount Health Sys., Inc.* v. *Wright*, 138 F.3d 706, 710-11 (7th Cir. 1998).

The Government acknowledges these concerns but contends that they do not arise in this case because the Eighth Circuit did not "interpret a party's rights under the *prior* version of a statute," and instead applied the clarification as if it were a new statute. U.S. Br. 15 n.8. But that is exactly the point: the Eighth Circuit's treatment of the clarification as a binding direction to *displace* prior applications of the statute is what generates the circuit split and requires this Court's review.

The other respondents repeat the insupportable view that the "clarification" was intended substantively to change § 20106 (without citing Congress's statements to the contrary) and contend that, in any event, *Lundeen II* was based upon the jurisdictional provisions of § 20106(c), which they assert is not part of the clarification amendment.

This argument misreads both the statute and *Lundeen II*. Sections 20106(b) and (c) were enacted together as a single "clarification" of § 20106(a). See Conf. Report at 351, *reprinted in* 2007 U.S.C.C.A.N. at 183-84. Moreover, the Eighth Circuit repeatedly cited § 20106(b) and Congress's clarification of the law as its justification for reversing the district court's preemption holding. See Pet. App. 9a-10a, 12a-16a. The circuits are split over whether such a statutory clarification should be treated as binding, and nothing in respondents' brief addresses this issue.

In the end, respondents are forced to argue that *Klein* cannot be read according to its terms and is, in effect, a dead letter. See U.S. Br. 12, 14-15; Resp. Br. 30-32. Those arguments support granting the petition: if *Klein* is to be laid to rest, that decision should result from this Court's considered judgment.

CONCLUSION

For these reasons and the reasons stated in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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